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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1966

FRANK LEE, As Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

vs.

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually ahd as mother and next friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

APPELLANTS' JURISDICTIONAL STATEMENT

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APPELLANTS' JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

This is an appeal by Frank Lee, as Commissioner of Board of Corrections of Alabama, et al., and Robert K. Austin as Warden of the City Jail of Birmingham, Alabama, from judgment entered on December 12, 1966, in accordance with the Order of the District Court of the United States for the Middle District of Alabama, as a three-judge statutory Court specially invoked by virtue of the provisions of 28 U.S.C.. §2281. This statement is submitted by the appellants to show that the Su-

preme Court of the United States has jurisdiction of the appeal and that a substantial Federal question is presented.

OPINION BELOW

The Opinion of the United States District Court for the Middle District of Alabama, Northern Division, sitting as a three-judge district court, is unreported at this date. The Opinion of said Court is set forth in the Appendix A, *infra*, at page 13.

JURISDICTION

This suit was brought by the plaintiffs (appellees) in the Court below allegedly under the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States and the following provisions of the United States Code: Title 42, Sections 1981 and 1983; Sections 1331, 1343 (3) (4), 2201, 2281 and 2283 of Title 28, United States Code; Sections 1981, 1983 and 1988 of Title 42, United States Code, and Rule 23 (a) (3) of the Federal Rules of Civil Procedure.

The appellees, plaintiffs below, claimed a right not to be segregated, classified, designated or otherwise subjected to racial distinctions in confinement in the state penal system and in the county, city and town jails of the State of Alabama. The plaintiffs also in the complaint asserted that various statutes enacted by the Legislature of the State of Alabama, requiring segregation by race in the state, county and city penal facilities, are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States, which statutes are as follows: Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958.

The appellants, defendants below, denied the claims of appellees, plaintiffs below, and alleged that the separation of the Negro and white prisoners in the prisons and jails of Ala-

bama was for reasons of internal security of the prisons and jails and to protect the prisoners, jailers and other from bodily harm.

The United States District Court for the Middle District of Alabama, Northern Division, sitting as a three-judge court on the 12th day of December 1966, rendered a final order (set out in full in the Appendix, *infra*, page 13), which held each of said Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, to be violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require segregation of the races in the prisons and jails of Alabama, and ordered the total desegregation of all state penal facilities, including the maximum security institutions, within a period of one year, and as to the county and city jail systems a completed desegregation within six months, in all areas, including quarters, except in very exceptional instances as, for example, the use of the "drunk tank." Said court ordered that the appellant Frank Lee (a defendant below) "as Commissioner of the Board of Corrections for the State of Alabama, his successors in office, agents, servants and employees, take the necessary and appropriate steps to desegregate immediately the several honor farms, the educational programs, the youth centers and the hospitals in the state penal system; that said officials take the necessary and appropriate steps to effect complete desegregation of the minimum and medium security institutions, as operated by the state penal system, within six months from the date of this decree; that said officials take the necessary and appropriate steps to effect complete desegregation of all other state penal facilities, including the maximum security institutions, within a period of one year from the date of this decree."

Said court also ordered that appellant Robert K. Austin (a defendant below) "as Warden of the City Jail of Birmingham, Alabama, and each warden in each town and city in the State of Alabama, their successors in office, agents, servants and employees, take the necessary and appropriate steps to completely desegregate the town and city jails, and any other penal facilities and operations that may be maintained by any such town or city, within a period of six months from the date of this decree."

By said order of the 12th of December 1966, said court also ordered that "the Commissioner of the Board of Corrections for the State of Alabama, his successors in office and agents designated by said Commissioner, supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama and report to this Court every three months beginning March 15, 1967, concerning the steps being taken and the progress being made in the state penal institutions and in the county and city jails and other penal facilities throughout the State of Alabama."

Notice of Appeal was filed by defendants Frank Lee, as Commissioner of Corrections of Alabama; John F. Britton, Charlie Cashion, Herschell Luttrell, Dr. Max McLaughlin and William Mitch, as Members of the Board of Corrections of Alabama, on February 6, 1967. Notice of Appeal was filed by Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama on February 8, 1967.

Jurisdiction to review by appeal an order granting or denying a permanent injunction in any civil action, suit or proceeding required by an act of Congress to be heard and determined by a district court of three judges is conferred upon this court by 28 U.S. Code, Section 1253.

That such a jurisdiction exists in the circumstances of this case is sustained by the following authorities: *Radio Corporation of America vs. United States*, 341 U.S. 412; *Florida Lime & Avocado Growers, Inc. vs. Jacobsen*, 362 U.S. 73.

STATUTES INVOLVED

The statutes involved in this case are Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958. Each of said sections are set out separately in Appendix B, *infra, page* 24, *et seq.*

QUESTIONS PRESENTED

1. Do state statutes which require the separation of white

and Negro prisoners in state penal institutions and county and city jails violate the provisions of the Fourteenth Amendment to the Constitution of the United States?

2. Does a prisoner serving a penitentiary sentence have the constitutional right to question the validity of state statutes requiring the separation of prisoners by race?

3. Does the District Court have jurisdiction and authority to require the defendant Commissioner of Corrections of Alabama to supervise the desegregation of all penal state facilities, including cities of under ten thousand population where state statutes invest authority in the said Commissioner only as to cities over ten thousand population?

4. Are §§ 4, 52, 121, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require the segregation of the races in the prisons and jails of Alabama?

5. Does the District Court have authority to order the defendant Frank Lee, as Commissioner of the Board of Corrections, to make reports to the court every three months, beginning March 15, 1967, as to the steps taken and progress made to eliminate segregation in the state penal institutions and the county and city jails in the State of Alabama?

6. Do the plaintiffs in this case have standing to challenge any of the statutes or practices requiring segregation, or relating to the segregation by race of the penal facilities of the City of Birmingham?

7. Is the appellant Austin (a defendant below) representative of other wardens and jailers of city and town jails of Alabama to the extent that plaintiffs may maintain this action against said Austin as representing a class composed of all other city wardens and jailers in Alabama under Rule 23, Federal Rules of Civil Procedure.

8. Does a Negro prisoner have a constitutional right to prevent the warden of a jail from confining such prisoner with other prisoners of his own race to the exclusion of prisoners of the white race where such warden is not compelled to do so by statute?

9. Does a white prisoner have a constitutional right to prevent the warden of a jail from confining such prisoner with other prisoners of his own race to the exclusion of prisoners of the Negro race, where such warden is not compelled to do so by statute?

10. Does the Order appealed from unduly restrict the exercise of lawful discretion on the part of state prison officials in the administration of the prisons?

STATEMENT

Caliph Washington, Hosea L. Williams, Julia Allen, individually and as mother and next friend of Willie Allen, a minor, Willie Allen, Agnes Beavers, individually and as mother and next friend of Cecil McCargo, Jr., a minor, Cecil McCargo, Jr., Johnnie Coleman and Thomas E. Houck, Jr., for themselves, jointly and severally, and for all others similarly situated, as plaintiffs, filed Civil Action No. 2350-N in the United States District Court for the Middle District of Alabama, Northern Division, against Frank Lee, as Commissioner of Corrections of Alabama; John F. Britton, Charlie Cashion, Herschell Luttrell, Dr. Max McLaughlin and William Mitch, as members of the Board of Corrections of Alabama; A. Melvin Bailey, as Sheriff of Jefferson County, Alabama and all other sheriffs of Alabama, jointly and severally, who are similarly situated; Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama, and all other wardens and jailers of city and town jails of Alabama, jointly and severally, who are similarly situated, as defendants, on February 18, 1966.

Plaintiffs Caliph Washington, Julia Allen, Willie Allen, Agnes Beavers, Cecil McCargo, Jr. and Johnnie Coleman are Negro citizens and residents of Alabama. Plaintiff Hosea L. Williams is a Negro citizen and resident of Georgia. Plaintiff

Thomas E. Houck, Jr. is a white citizen and resident of Florida. Plaintiff Johnnie Coleman is incarcerated in Kilby Prison, Montgomery, Alabama (a state prison). Plaintiff Willie Allen is confined in Camp Fayette, Alabama (a state prison). Plaintiff Cecil McCargo is confined in Camp Childersburg, Alabama (a state prison). Plaintiff Caliph Washington is confined in Jefferson County Jail. Plaintiff Hosea L. Williams, prior to suit, had been incarcerated briefly in Birmingham City Jail, Birmingham, Alabama on a charge of ordinance violation, but prior to the trial of this case had pleaded guilty, paid a fine and been discharged from further custody. Plaintiff Thomas E. Houck, Jr., a white man, prior to suit had been incarcerated briefly in Birmingham City Jail, Birmingham, Alabama, but prior to the trial of this case had pleaded guilty, paid a fine and been discharged from further custody.

The prison population in Alabama is 1546 white and 2510 Negro.

Defendant (appellant) Frank Lee, Commissioner of the Board of Corrections of the State of Alabama testified, in substance, that in his opinion orderly desegregation could be accomplished in the Alabama prison system without unduly upsetting or impairing prison discipline or security provided the prison officials were given sufficient time and were allowed some administrative discretion, and that the new prison facilities planned and under construction were designed upon an integrated basis. He testified that if the prisoners were integrated that trouble could be expected in the maximum security section of the prisons.

The order of the District Court appealed from orders of the appellant Lee, as Commissioner of the Board of Corrections, to "*supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama* and report to this Court every three months beginning March 15, 1967, concerning steps being taken in the county and city jails and other penal facilities throughout the State of Alabama." (Emphasis added) Yet, the law is clear, as was brought out in the testimony, that the Commissioner of the Board of Corrections is without authority to supervise jails of cities having a population of less than ten thousand.

The Birmingham City Jail, of which defendant Austin is warden, receives about two thousand prisoners a month. Most of the prisoners in the Birmingham Jail are short-time prisoners. The average daily prison population is from three hundred to four hundred. The average stay of a prisoner in the Birmingham Jail is from seven to fifteen days. There is some integration in the Birmingham City Jail insofar as work is concerned as follows: the trustees are integrated; some of the work gangs are integrated; the farm crew is integrated; the work crew that makes concrete pipe is integrated; the maintenance crew is integrated. The prisoners eat in the same dining room, but at different times. The white and Negro trustees eat in the dining room at the same time and no regulation prevents them from eating at the same table, however, they voluntarily eat at separate tables according to race. There are sleeping or dormitory areas occupied by only Negro prisoners and other sleeping or dormitory areas occupied only by white prisoners.

The Birmingham Jail has a different problem as to receiving prisoners from that which a state prison may experience. Fifty per cent of the incoming prisoners to the Birmingham City Jail are received because of the use of alcohol and are in a drunken condition. These prisoners are placed in what is known as a drunk tank. There is one drunk tank for Negroes and one drunk tank for white persons. To integrate the drunk tanks at the Birmingham City Jail would aggravate the prison security problems and endanger the safety of the prisoners.

The visiting facilities of the Birmingham City Jail are the same, but white prisoners receive visitors on one day and Negro prisoners receive visitors on a different day.

Defendant Austin did orally testify in substance that if ordered to integrate the Birmingham City Jail his main concern would be with the drunk tank and that any other "foreseeable problem I think I could work out if given time."

Defendant Austin stated in (7) (b) of his answers to plaintiffs' interrogatories his reason for the separation of prisoners by race in the Birmingham City Jail to the extent that they are so separated as follows:

"In the operation of the Birmingham City Jail, which is under my supervision, I have separated Negro and white prisoners because, in my opinion, it is necessary to do so in order to maintain the internal security of this prison or jail and protect the prisoners and others from bodily harm."

THE QUESTIONS ARE SUBSTANTIAL

This Court has not passed on the questions presented in this appeal.

This appeal presents important constitutional questions involving the authority of federal courts to direct particulars of prison management in that sensitive area of prison discipline and security. It is important to the public, law enforcement officers and municipal officers to know whether or not the Fourteenth Amendment contemplates the substitution of judicial opinion for the opinion of competent prison adminstrators as to procedures which are determined by such administrators to be desirable or necessary for the maintenance of prison discipline and security.

It is important to know to what extent, if any, may claimed Fourteenth Amendment rights of a prisoner be permitted to take precedence over rights of other prisoners and jailers to have prison administrators follow a procedure that will, in the opinion of such administrators, best insure prison discipline and security.

Prisoners, prison employees and the public are entitled to a procedure in prisons that will best insure prison discipline and security and remove causes for disorders and riots. Such procedures can best be determined by persons charged by law with the duty of maintaining prison discipline and security.

Some Fourteenth Amendment rights may follow a prisoner into jail. Other rights do not.

It has been held that a prisoner placed in jail has only such

rights, including constitutional rights, as will not impair prison discipline or internal security. *Sostre vs. McGinnis,* 334 F. 2d 906, *cert. den.,* 379 U.S. 892.

Freedom of speech, a constitutional right, is not available to a prisoner in jail. *McClaskey vs. Maryland,* 337 F. 2d 72.

The right to receive letters in prison may be limited. *United States vs. Illinois, et al.,* 343 F. 2d 120.

Religious freedom, a constitutional right, may be limited in prison. *Sostre vs. McGinnis,* 334 F. 2d 906, *cert. den.,* 379 U.S. 892.

The right of a prisoner to receive mail yields to the requirement of maintaining internal discipline of prison. *United States vs. Fay,* 197 F. Supp. 855.

The attendance at a prison school may be denied. *United States vs. Pate,* 229 F. Supp. 818.

The order of the three-judge court from which this appeal is taken places in the court detailed supervisory authority over prison officials in the administrative management of their prisons insofar as such management relates to race. This order dilutes prison officials' authority to maintain prison discipline and security where race is a factor and can result in procedures being adopted because such order seems to so demand rather than being adopted solely with a view of what is best for prison discipline and security in a particular prison or jail.

As to whether state and city prison officials shall be permitted to manage and regulate their prisons and separate, segregate and assign prisoners all as to them is in the best interest of prison discipline and security, without regard to ordered directions from a federal court, is a serious constitutional question of the gravest importance. A decision of this Court is needed to set at rest once and for all the issues named in this case.

We respectfully ask this Court to hold that the separation of the races in a prison or jail, by administrative officials, in charge of such prison or jail, when they are of the opinion that

such separation will aid in maintaining discipline and prison security, is not a violation of any constitutional right of a prisoner, either Negro or white. To hold otherwise will involve federal courts throughout this nation in minute supervision of prison management in this area, and would preempt the exercise of lawful and reasonable discretion on the part of prison administrators. A prisoner loses his right to select his associates when he is committed to prison. His associates are selected by the prison administrators in all areas. The area of race should not be an exception.

This case presents a question of substantial importance which affects the State of Alabama and every city and town thereof. If the three-judge district court is correct in its holding, then regardless of prison discipline and internal security every state, county and municipal prison or jail in the State of Alabama must confine their prisoners on an integrated basis. This case will be cited in other cases throughout the nation as persuasive authority on this subject, although this Court has not considered the very important issues involved or the extent or limitation to be placed upon extended federal judicial supervision of state and municipal prisons and jails if such supervision is to be approved.

CONCLUSION

For the reasons stated, the questions presented by this appeal are so substantial and are of such public importance as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

It is respectfully submitted that probable jurisdiction should be noted.

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Birmingham, Alabama, Appellant

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CALIPH WASHINGTON,) HOSEA L. WILLIAMS, JU-) LIA ALLEN, individually and) as mother and next friend of) WILLIE ALLEN, a minor,) WILLIE ALLEN, AGNES) BEAVERS, individually and) as mother and next friend of) CECIL McCARGO, JR., a mi-) nor, CECIL McCARGO, JR.,) JOHNNIE COLEMAN, and) THOMAS E. HOUCK, JR., for) themselves, jointly and several-) ly, and for all others similarly) situated,)

Plaintiffs,)

vs.) CIVIL ACTION NO. 2350-N

FRANK LEE as Commission-) er of Corrections of Alabama;) JOHN F. BRITTON, CHAR-) LIE CASHION, HERSCHELL) LUTTRELL, DR. MAX Mc-) LAUGHLIN and WILLIAM) MITCH, as members of the) Board of Corrections of Ala-) bama; A. MELVIN BAILEY,) as Sheriff of Jefferson County,) Alabama and all other sheriffs) of Alabama, jointly and sever-) ally, who are similarly situated;) ROBERT K. AUSTIN as War-) den of the City Jail of Birming-)

ham, Alabama, and all other)
wardens and jailers of city and)
town jails of Alabama, jointly)
and severally, who are simi-)
larly situated,)
Defendants.)

Before RIVES, Circuit Judge, and LYNNE and JOHNSON, District Judges.

JOHNSON, District Judge:

ORDER

This is an action for declaratory and injunctive relief instituted by one white and five Negro citizens on their own behalf and on behalf of other persons similarly situated, pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure. The plaintiffs seek a declaration concerning the rights of Negro citizens, male and female, not to be segregated, classified, designated, or otherwise subjected to racial distinctions in confinement in the state penal system and in the county, city and town jails of the State of Alabama. Further, plaintiffs assert that various statutes enacted by the Legislature of the State of Alabama, requiring segregation by race in the state, county and city penal facilities, are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States. Plaintiffs ask that said statutes be declared unconstitutional and that the defendants be enjoined from requiring segregation by race in any of the state, county and city penal institutions in the State of Alabama.

Of the Negro plaintiffs, Caliph Washington is confined in the Jefferson County Jail, Jefferson County, Alabama, awaiting retrial on a capital charge; Johnnie Coleman, Willie Allen and Cecil McCargo, Jr., are confined in state penal institutions, and prior to their present incarceration had been confined under racially segregated circumstances in either city, town or county jails in Alabama; and Hosea L. Williams and Thomas E. Houck, Jr., were incarcerated in the Birmingham City Jail at the time this case was instituted.

The defendant Frank Lee is Commissioner of the Board of Corrections of the State of Alabama and as such is invested with the authority and charged with the duty of serving as the chief administrative officer of the Alabama Board of Corrections. Title 45, § 10(5), Code of Alabama, Recompiled 1958. The defendant A. Melvin Bailey is the duly elected and qualified sheriff of Jefferson County, Alabama, and as such has the legal custody and charge of the Jefferson County Jail and all prisoners committed thereto. Title 45, § 115, Code of Alabama, Recompiled 1958. The defendant Robert K. Austin is warden of the City Jail of Birmingham, Alabama, and in this capacity has the custodial duty and authority over prisoners in that jail. The defendants Bailey and Austin are sued individually and as representatives of all county sheriffs of Alabama and of all wardens and jailers of the city and town jails of Alabama.[1]

I

As noted in the complaint filed with the Clerk of this Court on February 18, 1966, plaintiffs Williams and Houck allege that they were then incarcerated in the City Jail of Birmingham, Alabama. It now appears, however, that the charges against Houck have been nol prossed and that Williams has entered a plea of guilty to the charges against him and has paid the fine imposed upon said plea. For these reasons, the defendants Austin and Bailey contend that plaintiffs have no standing to challenge any of the statutes or practices requiring segregation or relating to the segregation by race of the penal facilities of the City of Birmingham or Jefferson County. In *Singleton v. Board of Commissioners*, 356 F. 2d 771 (5th Cir. 1966), this same issue was raised in that the plaintiff had completed the actual service of his sentence. In *Singleton*, the Court set forth the general principle applicable in such instances:

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[1] In the complaint as originally filed, plaintiffs also named as defendants the individual members of the Board of Corrections of Alabama and asked that said defendants be enjoined from excluding Negroes from employment, or otherwise discriminating against Negroes in their efforts to secure employment with the Alabama prison authorities. Upon a pretrial hearing of this cause, and by agreement of counsel, this phase of the lawsuit was stricken.

The general standing requirement in cases involving governmental segregation is that the plaintiffs must show past use of the facilities, where feasible, and a right to, or a reasonable possibility of future use.

There is no question but that the evidence in this case reflects a "past use" of the penal facilities of the City of Birmingham and Jefferson County by some of these plaintiffs. As to that part of the general rule stated in *Singleton* concerning the "reasonable possibility of future use," this Court does not conceive that it is necessary that plaintiffs show an intention to violate the laws of the State of Alabama or the City of Birmingham in such a manner that would subject one or more of them in the future to imprisonment in these locations. *Mitchell v. United States*, 313 U.S. 80. Under the circumstances reflected by the evidence in this case, all that it is necessary for the plaintiffs to show on this particular point, in order to challenge the statutes and practices concerning segregation of the races in the penal facilities in the Birmingham City Jail and the Jefferson County Jail is that the operation of these institutions, as that operation presently exist, "permit[s] the recurrence of comparable violations." *Henderson* v. *United States*, 339 U.S. 816. In this regard, the Supreme Court of the United States in *Barrows* v. *Jackson*, 346 U.S. 249, observed that the rule against relying on the constitutional rights of another (who may be in this case presently imprisoned in either the penal facility of the City of Birmingham or of Jefferson County) is not part of the constitutional requirement of standing, but is a rule of self-restraint which the court has developed for its own governance, and, for that reason, is a mere rule of practice not to be applied where it would be difficult, if not impossible, for the persons whose rights are asserted to present their grievance to a court of competent jurisdiction[3]. See also *Ferguson* v. *Buchanan*, No. 64-107-CIV-CF, So. Dist. Fla., March 12, 1965, where the criminal prosecution against the plaintiff, who was seeking to enjoin

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[3] In this connection, defendant Austin testified that the average length of time prisoners are incarcerated in the Birmingham City Jail is from seven to fifteen days. Under such circumstances, it would be impossible for a prisoner to file and secure an adjudication on his case before he was released.

the sheriff of Dade County, Florida, from maintaining segregated facilities in the jails of Dade County, was nol prossed before the case was submitted to the district court. That court, nevertheless, found the Florida statutes that required segregation in county jails on the basis of race unconstitutional, and enjoined the defendants from operating or maintaining jails in a manner requiring segregation of the races. For these reasons, it is evident that the contention on the part of defendants Austin and Bailey that these plaintiffs do not have standing to challenge the statutes and practices requiring segregation of the races in the penal facilities of the City of Birmingham and Jefferson County is not well taken.

II

As to the contention of the defendants Austin and Bailey that they are not representative defendants of other wardens, jailers and sheriffs in the State of Alabama and, therefore, that these plaintiffs cannot maintain this action through them as representatives of "the class" within the meaning of Rule 23, Federal Rules of Civil Procedure, this Court concludes to the contrary. While it may be that the physical facilities of Jefferson County and the City of Birmingham are more elaborate and their operations more complex than many of the other jails in Alabama, this, without more, cannot serve to nullify the operation of that portion of the class action rule that authorizes representative defendants. See *Harris* v. *Palm Springs Alpine Estates, Inc.*, 329 F. 2d 909 (9th Cir. 1964). See also *Potts* v. *Flax*, 313 F. 2d 284 (5th Cir. 1963); *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala. 1962). It would be extremely difficult, if not impossible, to find members of a class to serve as representative defendants in a case, such as this one, where there are not some material differences in the physical facilities and operations involved. But since the rule requires only that there be questions of law and fact common to these defendants and the members of the class which they represent—a requirement which, as indicated, is satisfied in this case—then it becomes immaterial whether certain of these class defendants are not otherwise identically situated. 3 Moore, Federal Practice, ¶ 23.10 at 3454

(2d Ed. 1963). See *Harris* v. *Palm Springs Alpine Estates, Inc.*, supra (citing cases).[3]

III

The only defense offered to the contention that the statutes involved herein[4] violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is that the practice of racial segregation in penal facilities is a matter of routine prison security and discipline and is, therefore, not within the scope of permissable inquiry by the courts. We disagree. Since *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and the numerous cases implementing that decision, it is unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated. As stated by the Fifth Circuit in *Singleton* v. *Board of Commissioners*, supra:

> Twelve years ago, in Brown v. Board of Education of Topeka, 1954, 347 U.S. 483, the Supreme Court effectively foreclosed the question of whether a State may maintain racially segregated schools. The principle extends to all institutions controlled or operated by the State. "[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities." Johnson v. Virginia, 1963, 373 U.S. 61, 62, 356 F. 2d at 772.

Although it is true that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges

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[3] On this point this Court has serious misgivings as to the right of either the defendant Austin or the defendant Bailey to raise this particular question in this case. It appears that such a defense would, if valid, inure only to the benefit of other members of "the class" that these defendants are alleged to represent. The contention on the part of these defendants that, if they are not proper representatives of the other members of the class, venue in this district is improper as to them is without legal basis. Title 28, § 1392 (a), United States Code.

[4] The Alabama statutes that require segregation of the races in the prisons and jails of Alabama are §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958.

and rights, a retraction justified by the considerations underlying our penal system,'[8] it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law. *Cooper* v. *Pate*, 378 U.S. 546 (1965); *Cochran* v. *Kansas*, 316 U.S. 255 (1942); *Sewell v. Pegelow*, 291 F. 2d 196 (4th Cir. 1961); *Pierce* v. *LaVallee*, 293 F. 2d 233 (2d Cir. 1961), and *Fulwood* v. *Clemmer*, 295 F. 2d 171 (D.C. Cir. 1961). In this regard, this Court can conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama penal facilities. We recognize that there is merit in the contention that in some isolated instances[9] prison security and discipline necessitates segregation of the races for a limited period. However, recognition of such instances does nothing to bolster the statutes or the general practice that requires or permits prison or jail officials to separate the races arbitrarily. Such statutes and practices must be declared unconstitutional in light of the clear principles controlling.

Plaintiffs' contention that the separation of prisoners solely on the basis of race constitutes a violation of the "Cruel and Unusual" Punishment Clause of the Eighth Amendment to the Constitution of the United States is plainly without merit. There is no question but that, through the action of the Fourteenth Amendment, the Eighth applies to the states, *Robinson* v. *California*, 370 U.S. 660 (1962). However, the Cruel and Unusual Punishment Clause of the Eighth Amendment was adopted to prevent inhuman, barbarous or torturous punishment, *Black* v. *United States*, 269 F. 2d 38 (9th Cir. 1959), cert. denied, 361 U.S. 938 (1960); *Hemans* v. *United States*, 163 F. 2d 228 (6th Cir.), cert. denied, 332 U.S. 801 (1947); and segregation of individuals, while incarcerated, solely by reason of their race does

[8] **Price v. Johnston, 334 U.S. 266 (1948).**

[9] **For example, the "tank" used in the City of Birmingham and other large municipal jails where intoxicated persons are placed upon their initial incarceration and kept until they become sober. According to the evidence in this case, the population of the "tank" on Saturday nights in the Birmingham jail reaches fifty or more.**

not, in the opinion of this Court, constitute cruel and unusual punishment.

IV

The operation of penal institutions, whether it be on a state-wide or local level, is a highly specialized endeavor, and the sober judgment of experienced correctional personnel, such as Frank Lee as Commissioner of the Board of Corrections for the State of Alabama and A. Melvin Bailey as sheriff of Jefferson County, Alabama, deserves the most careful consideration of this Court. In this connection, it is recognized that "[t]he association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings," *Edwards* v. *Sard*, 250 F. Supp. 977 (D.C. Dist. 1966), and in light of this recognition this Court will not at this time require an immediate and total desegregation of state, county and city penal facilities in the State of Alabama. However, the several honor farms, the educational programs, the youth centers and the hospitals in the state system must be completely desegregated immediately. All facilities in the minimum and medium security institutions, including Draper Correctional Center and Julia Tutwiler Prison for Women, must be completely desegregated within six months. As to the maximum security institutions, such as Kilby Prison and Atmore Prison, the evidence reflects that considerations of security and discipline require a more gradual desegregation. In this connection, the Court will expect complete and total desegregation of all state penal facilities, including the maximum security institutions, within a period of one year. As to the county and city systems, complete desegregation should be achieved within six months in all areas, including quarters, except in very exceptional instances as, for example, in the use of the "tank" mentioned previously.

No plan of desegregation will be required of any of these defendants. However, since it is the function and duty of the Board of Corrections for the State of Alabama, and particularly the Commissioner thereof, pursuant to §§ 3, 7, 10(1), 10(5), 10(8) and 11, to inspect and generally supervise every county and municipal jail or prison in any incorporated town and city

in the State of Alabama having ten thousand or more population, this Court will require the Commissioner of the Board of Corrections to supervise not only the desegregation of state penal facilities as herein ordered, but also the desegregation of the jails in the counties throughout the State of Alabama and in all towns and cities throughout the state. The Commissioner of the Board of Corrections will be required to report to this Court every three months beginning March 15, 1967, concerning the steps being taken and the progress being made in the state penal institutions and the county and city jails, and other penal facilities throughout the State of Alabama.

In view of the declarations herein made concerning the unconstitutionality of the state statutes in question to the extent that those statutes require segregation of the races solely by reason of their color, and with the further declarations as to the unconstitutionality of the practice of segregating prisoners in any of the state, county or city penal facilities solely by reason of race, and the declarations concerning the duty of appropriate officials to take the necessary steps within the periods herein indicated, this Court does not consider it necessary to issue a formal injunction in this case at this particular time. However, there should be no misunderstanding on the part of any of the officials involved concerning the duty imposed upon them by the law generally and by this order specifically to cease the practice of arbitrarily segregating the races in the state, county and city penal facilites. The officials of the State of Alabama, whether they be concerned with the state penal facilities or the county and city penal facilities, have an affirmative duty and responsibility to effect desegregation of these facilities in accordance with this decree. Jurisdiction of the case will be specifically retained for all purposes.

It is, therefore, the ORDER, JUDGMENT and DECREE of this Court that §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, be and are, in each instance, declared violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require segregation of the races in the prisons and jails of Alabama.

It is further ORDERED that the defendant Frank Lee as Commissioner of the Board of Corrections for the State of

Alabama, his successors in office, agents, servants and employees, take the necessary and appropriate steps to desegregate immediately the several honor farms, the educational programs, the youth centers and the hospitals in the state penal system; that said officials take the necessary and appropriate steps to effect complete desegregation of the minimum and medium security institutions, as operated by the state penal system, within six months from the date of this decree; that said officials take the necessary and appropriate steps to effect complete desegregation of all other state penal facilities, including the maximum security institutions, within a period of one year from the date of this decree.

It is further ORDERED that the defendant A. Melvin Bailey as sheriff of Jefferson County, Alabama, and each sheriff of each county in the State of Alabama, their successors in office, agents, servants and employees, take the necessary and appropriate steps to completely desegregate the county jails and any other penal facilities and operations that may be maintained by any such county, within a period of six months from the date of this decree.

It is further ORDERED that the defendant Robert K. Austin as warden of the City Jail of Birmingham, Alabama, and each warden in each town and city in the State of Alabama, their successors in office, agents, servants and employees, take the necessary and appropriate steps to completely desegregate the town and city jails, and any other penal facilities and operations that may be maintained by any such town or city, within a period of six months from the date of this decree.

It is further ORDERED that the Commissioner of the Board of Corrections for the State of Alabama, his successors in office and agents designated by said Commissioner, supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama and report to this Court every three months beginning March 15, 1967, concerning the steps being taken and the progress being made in the state penal institutions and in the county and city jails and other penal facilities throughout the State of Alabama.

It is further ORDERED that each sheriff and each warden in the counties, cities and towns in the State of Alabama furnish the Commissioner of the Board of Corrections for the State of Alabama such reports and information that may be required by said Commissioner in the discharge of his duty to report to this Court.

It is further ORDERED that the costs incurred in this proceeding be and they are hereby taxed against the defendants, but the Court is of the opinion that the State of Alabama should pay the costs for the defendants.

Done, this the 12th day of December, 1966.

RICHARD T. RIVES
United States Circuit Judge

SEYBOURN H. LYNNE
United States District Judge

FRANK M. JOHNSON, JR.
United States District Judge

APPENDIX "B"

Section 4, Title 45

Code of Alabama, Recompiled 1958

"4. *Authority as to tubercular patients, and management of hospitals.*

The state department may also make such changes in the existing arrangements with reference to the segregation and treatment of tubercular patients, and other patients needing long time hospital detention and care, who are serving sentences for conviction of crime, so as to permit such patients to be transferred to the custody and care of those officers and agents who have the charge and control of the detention hospital or hospitals of the state convict system; the agents in charge of such hospital or hospitals during the period of the treatment of such convict patients are constituted the legal custodians of such convicts. Any such hospital or hospitals, or other places suitable and used under the convict system for the segregation and treatment of tubercular or long time patients may be opened under the authority of the state department and may be used for the segregation treatment and care of other inmates afflicted with tuberculosis or other diseases or ailments requiring long time detention, treatment and care, and who may be received from any other institution covered by this article, or from any hospital or other duly accredited and responsible institution in the state with which the state department may co-operate in the matter of the treatment or care of such patients. There shall be proper separation of convicts from free persons, whites from blacks, males from females, in such hospital or place of detention. The department is given general authority over the reception, care, custody and segregation of such persons, and is also vested with the power and authority, by and with the approval of the governor, to establish and promulgate rules and regulations for the proper conduct of the business and operation of such hospitals and places of detention, except as may be otherwise provided by this article."

Section 52, Title 45

Code of Alabama, Recompiled 1958

"52. (3643) (6547) (4493) (4658) *Males and females not worked or confined together; nor whites and blacks.*

It shall be unlawful for white and colored convicts to be chained together or to be allowed to sleep together; and it shall be unlawful to chain together or to confine together in the same room or compartment, male and female convicts. Whenever in the judgment of the governor and the director, it is practicable to do so, arrangements shall be made for keeping white and colored convicts at separate prisons and they shall not be allowed to be kept at the same place."

Section 121, Title 45

Code of Alabama, Recompiled 1958

"121. (4806) (7196) (4951) (4540) (4491) (3789) (241)

What prisoners kept separate.

Men and women, except husband and wife, must not be kept in the same room; and white and colored prisoners, before conviction, must also be kept separate and apart, if there be a sufficient number of apartments for that purpose."

Section 122, Title 45

Code of Alabama, Recompiled 1958

"122. (4856) *Prisoners separated by race and sex.*

It shall be unlawful for any sheriff, or jailer, or other keeper of the jail or the town or city prison, to confine in the same room or apartment of any jail or prison white and Negro prisoners; and men and women, except husband and wife, must not be kept in the same room or apartment."

Section 123, Title 45

Code of Alabama, Recompiled 1958

"123. (3722) (6619) (4557) (3755) (4321) *Imprisoning together white and colored prisoners before conviction.*

Any jailer or sheriff, having the charge of white and colored prisoners before conviction, who imprisons them permanently together in the same apartment of any jail, or other place of safe keeping, if there is a sufficient number of apartments to keep them separate, must, on conviction, be fined not less than fifty nor more than one hundred dollars."

Section 172, Title 45

Code of Alabama, Recompiled 1958

"172. (4866) *Janitor service and bathing facilities.*

The court of county commissioners, board of revenue, or city council, shall provide adequate janitor service for, and shall enforce cleanliness in their respective jails; shall provide bathing facilities separate for Negroes and whites, males and females, soap and towels, hot and cold water, clean and sufficient bedding, and with clean clothes when the prisoners are not able to provide them."

Section 183, Title 45

Code of Alabama, Recompiled 1958

"183. (4877) *Size, etc., of jail, etc.*

Each county jail, or town or city prison, must be of sufficient size and strength to contain and keep securely the prisoners confined therein; and must contain at least four separate apartments, one for white men, and one for white women, one for Negro men, and one for Negro women. It shall be fireproof, properly ventilated, sufficiently lighted, by day and night, adequately heated, containing adequate sanitary plumbing, and sewerage connections, including separate bath facilities for whites and Negroes."